

2000

**the
travellers' advice
team**

SOLICITORS
PART OF **the community law partnership**

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Chris Esdaile
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14 September, 2000

Dear Grattan

Re: Horsmonden Horse Fair

Thank you for your letter dated 3 September 2000 enclosing your statement in respect of the events occurring at Horsmonden on 10 September 2000. The statement gives an excellent account of the activities of the Police on the day in question.

We note that you may be attending the meeting at Horsmonden on Sunday. We have prepared a summary of the legal issues and the outcome of the Court hearing and we enclose a copy. You may feel that the summary might assist in informing others of the legal challenge.

We are presently instructed by yourself by Friends, Families and Travellers and by Mr T O'Doherty to assist in the possible application to the European Court of Human Rights.

We have forwarded Instructions to Counsel to advise generally as to merits and we shall keep you informed of developments. Should the Gypsy Council for Education, Culture, Welfare and Civil Rights wish to instruct us in respect of the matter then you will no doubt let me or Chris Johnson know.

We also take this opportunity to enclose a copy of the Court Order which has just been received.

Yours sincerely



Mike McIlvaney
The Community Law Partnership

Enc.



CO/3213/2000

DATED the 7th day of September 2000

IN THE HIGH COURT OF JUSTICE

QUEEN'S BENCH DIVISION

CROWN OFFICE LIST

BEFORE MR DAVID PANNICK Q.C.
(SITTING AS A DEPUTY HIGH COURT JUDGE OF
THE QUEEN'S BENCH DIVISION)

IN THE MATTER of an application for permission to
apply for Judicial Review

THE QUEEN -v- TUNBRIDGE WELLS BOROUGH
COUNCIL (1)
SECRETARY OF STATE FOR HOME
OFFICE (2)

EX PARTE THE GYPSY COUNCIL FOR EDUCATION,
CULTURE, WELFARE & CIVIL RIGHTS

UPON HEARING Mr J Luba QC with Mr M Willers QC of
Counsel on behalf of the above-named Applicant for permission to issue a
Notice of application for Judicial Review of :-

1. The decision taken by the First Respondent on or about 14th August 2000
to seek the consent of the Second Respondent for the making of an order
under Section 14A of the Public Order Act 1986.
2. The decision taken by the Second Respondent on or about 31st August
2000 that consent be given to the making of the said order

AND UPON READING the statement lodged pursuant to Order 53 Rule 3(2) of the Rules of the Supreme Court

AND THE RELIEF SOUGHT:-

1. Certiorari to quash the said decisions
2. Further or other relief
3. Costs
4. An expedited hearing

AND UPON READING the affidavit of Michael Charles McIlvaney sworn the 5th day of September 2000 together with the exhibits referred to therein filed on behalf of the Applicant in support of this application

AND UPON READING the affidavit of Chirs Briggs unsworn together with the exhibits referred to therein filed on behalf of the First Respondent and the affidavit of Stewart Baxter sworn on the 6th day of September 2000 with exhibits referred to therein on behalf of the Second Respondent

AND UPON HEARING Mr J Findley of Counsel on behalf of the First Respondent and Mr S Grodzinski of Counsel on behalf of the Second Respondent and Mr G Boyle of Counsel on behalf of the Interested Party (The Chief Constable)

IT IS ORDERED that permission to apply for Judicial Review be granted, lodgement and service of the notice of application be dispensed with and in accordance with order 53 all times abridged

IT IS FURTHER ORDERED that this application be dismissed

AND IT IS ORDERED that there be no order as to costs

[This matter occupied the time of the Court from 11.11-12.57 & 13.58-14.57]

By the Court

HORSMONDEN HORSE FAIR - SUMMARY OF LEGAL ISSUES AND OUTCOME OF COURT HEARING

On 4 September 2000 the Tunbridge Wells Borough Council made an Order prohibiting any trespassory assembly within a 5 mile radius of Horsmonden Village Green on Sunday 10 September 2000. The effect of the Order would be to prohibit the traditional fair which was a significant cultural and social event in the way of life of Britain's Romany Gypsy community and which had been held on the same site for possibly many generations.

THE ORDER

A copy of the Order is attached. The Order is purported to be made under Section 14A(1) of the Public Order Act 1986 as amended by the Criminal Justice and Public Order Act 1994. The effect of an Order made under the relevant section is that trespassory assemblies (20 or more persons) can be prohibited for a maximum of 4 days and within an area not exceeding 5 miles of the prohibited area (in this case Horsmonden Village Green). It is a pre-requisite of the making of such an Order that such an assembly is:-

‘Likely to be held without the permission of the occupier of the land’ and
- ‘may result in serious disruption to the life of the community in the vicinity of the prohibited area.

THE PROCESS

For such an Order to be made, an application has to be made by the Chief Constable to the Borough Council. Once such an application is made, the Council is required to seek the Secretary of State’s consent to the making of the Order. After that, the Council has a *discretion* to make, or refuse to make, an Order.

As stated, in this case the Order was made on 4 September 2000 following an application by the Chief Constable and following the receipt of consent from The Home Secretary.

THE LEGAL CHALLENGE

We received instructions to mount a legal challenge in an attempt to save the Fair. On 5 September 2000 proceedings were issued in the High Court for a judicial review of decisions taken by Tunbridge Wells Borough Council and by the Secretary of State for the Home Department. The Chief Constable of Kent was subsequently joined to the proceedings as an interested party. Mr Jan Luba QC and Mr Marc Willers (Counsel) kindly agreed to present the case at the hearing which took place on Thursday 7 September 2000.

LEGAL SUBMISSIONS

(i) *Failure to properly exercise discretion*

It was argued that both the Secretary of State and the Borough Council had taken into consideration **irrelevant** factors as follows:-

The Council and the Home Department had taken account of the fact that the Parish Council felt financially or organisationally unable to run the event. This was not a fact which had any relevance to the Section under which an Order was sought - The Secretary of State and the Council accepted a mere assertion of the Parish Council that the event could not take place for 'safety reasons'. This would only have been a relevant consideration had there been any evidence of risk to life or limb based on previous incidents or on evidence of previous disruption. The decision had been taken without there being any such evidence.

(ii) Secondly, there was a failure to take account of factors that were **relevant** to the decision and which were as follows:-

- it was not clear whether any investigations had been made as to the identity of the occupier of the land and as such it was not clear whether there would be 'trespass' at all.

The question of whether the fair had been given 'implied' consent was not considered and it was submitted that there had been no enquiry as to the Parish Council's estate or interest in the land.

- the statute directs attention to the relevance of possible effects of an assembly on the land itself and on buildings. There was no suggestion that 'significant damage' to the land was in prospect. That was a factor that should have been considered in favour of **not** making the Order.

- consideration was not given to the question of whether the assembly might result in 'serious disruption to the life of the community'. No such mention was made in the Council Committee Report. In past years the event has passed off peacefully save for the odd instant which might be expected at any large gathering. No arrests have been made in the previous 2 years.

- any prospective disruption needed to be identified and balanced against the disruption to the other 'community' - the Romany Gypsy Community if the fair were cancelled.

- the Council and the Home Office seemingly had no regard to alternative ways in which the fair might be staged notwithstanding various representations made by and on behalf of the Romany Gypsy Community.

- another relevant consideration was the fact that the Council was under a statutory duty to promote equality of opportunity and good relations between persons of different racial groups (Section 71 Race Relations Act 1976). The Respondents should have had regard to the adverse effect on race relations that the making of the Order might have. This was not a relevant consideration for the Council.

- the Secretary of State as a Government Minister was required to have regard to the international obligations contained in **the Framework Convention for the Protection**

of National Minorities which came into force on 1 May 1998. By Article 5 of the Convention the Government undertook to promote the conditions necessary for persons belonging to national minorities 'maintain and develop their culture and to preserve the essential elements of their identify - namely their religion, language, traditions and cultural heritage'. No regard was had.

EUROPEAN CONVENTION ON HUMAN RIGHTS AS A RELEVANT CONSIDERATION

It was submitted that both the Council and the Home Department should have had regard to the principles set out in the European Convention on Human Rights as their incorporation into domestic law grows nearer. There is authority for the proposition that public bodies are required to refrain from exercising powers which may infringe upon convention rights and have particular regard in this case to the following:-

- Article 8 - Right to respect for a particular form of private or family life**
- Article 11 - Freedom of Assembly**
- Article 14 - Freedom from discrimination**

There was no material before the Court to indicate that either the Borough Council or the Home Department had regard to the importance of the tension between the powers provided by Section 14A Public Order Act 1986 and the above mentioned convention rights.

In all of the circumstances it was submitted that the decisions of the Home Department and the Borough Council be quashed.

Counsel for the Council was unable to confirm that the meeting of the Council which approved a recommendation to seek the Home Secretary's consent to an order prohibiting the Fair had any

more information before it than that contained in a report to the Committee (which gave no indication that the Council had considered relevant matters). However, it was submitted that the Council would have known about the issues involved and would have based their decision upon their consideration of such issues.

Counsel for the Home Department, instructed by the Treasury Solicitors, argued that the Home Secretary had before him relevant material. Documentation was produced in the form of an exhibit to a witness statement. This included anecdotal evidence of previous disruption from members of the settled community. It was also submitted that the Home Secretary had had regard to Convention Rights as he had been presented with a letter from the Travellers Advice Team at The Community Law Partnership in late August which warned that any attempt to prohibit the Fair may infringe Convention Rights.

THE DECISION

The Judge gave a lengthy judgement. He found that sufficient relevant information was before both the Borough Council and the Home Secretary to enable them to properly exercise their discretion and where it was not clear that information was before them the Judge found that it would have been 'in their minds'. The Judge found against each and every submission that had been put in support of the challenge. He stated that the need to avoid disruption to the local settled community should take priority and the fact that the Romany community could go to an alternative site some 20 miles away with the blessing of the Local Authority and the Police served to limit the impact on the Romany Gypsy community. He found that there was no basis for the argument that the Convention on Human Rights was not taken into account and that the impact of any Order would have a disproportionate impact upon the Romany community. He further found that the Borough Council, whilst not referring to the rights of the Romany community, could not have been unaware of the impact of the Order upon it.

In the circumstances the Judge dismissed the application for judicial review. He made no order for costs and refused permission to appeal.

APPLICATION TO EUROPEAN COURT OF HUMAN RIGHTS

We have discussed with Counsel an application to the European Court of Human Rights. An action can potentially be taken by an individual, or group of individuals, or an organisation(s) whose rights as set out in the Convention have been violated. An applicant will normally be required to show that they have been directly affected by the violation. An application to the European Court would (presently) be based on the following grounds:-

- (1) The effect of the Order made under Section 14 of the Public Order Act 1986 as amended violated the Convention Rights set out at Article 8 (Right to Respect for private and family life), Article 11 (Freedom of Assembly) and Article 14 (Prohibition of Discrimination).
- (2) The Court failed to have proper regard to those Convention Rights.
- (3) By Article 6 of the Convention 'Everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial Tribunal established by law'. This case was decided by Mr D Pannick QC sitting as a Deputy Judge. Mr Pannick is retained by the Treasury (whose Solicitors were instructed in this case on behalf of the Home Department). It can be argued that Mr Pannick's appointment to this case was inconsistent with Article 6.

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